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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

DONALD J. KUSS and WALTER MACLYN CONLON,

Petitioners,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

DONALD J. KUSS and WALTER MACLYN CONLON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Donald J. Kuss and Walter Maclyn Conlon, hereby petition for a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York which affirmed a judgment of the Supreme Court, Westchester County, convincing both petitioners of the crime of taking unlawful fees in violation of Section 1826 of the former Penal Law of the State of New York and imposing a jail sentence of one year on each petitioner.

Opinions Below

The opinions affirming the petitioners' conviction is officially reported (*People* v. *Kuss,* 32 N.Y. 2d 436). The Appellate Division, Second Department, affirmed the decision, with one Justice dissenting in part (*36 A.D. 2nd 306*) (Appendix A, Appendix B).

Jurisdiction

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 J.S.C., Sec. 1257 (3). Petitioners' Fifth, Sixth and Fourteenth Amendment rights to a fair trial were unlawfully interfered with.

Constitutional Provisions Involved

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether, under the peculiar circumstances of the instant case the totality of the circumstances were such as to deny petitioners a fair trial pursuant to the requirements of the Fifth and Fourteenth Amendments of the United States Constitution?

2. Whether the petitioners' Fifth Amendment privilege against self-incrimination was violated by the use of unconstitutionally obtained evidence from a prior Grand Jury hearing to effect the indictment in the present case?

3. Whether the fundamental rights of Appellants were violated by the prosecution's inflammatory summation and the trial court's erroneous charge which in effect required appellants to prove their innocence in the absence of objection at the trial?

Statement

Petitioners, Donald J. Kuss and Walter Maclyn Conlon, were jointly tried in the Supreme Court, Westchester County, New York, and convicted of taking unlawful fees, a felony, and sentenced to a one-year jail term on January

28, 1969. Petitioners' sentence was stayed and they were released on bail pending determination of their appeal, which stay was continued pending application to this Court of this Writ (Appendix C).

This petition is grounded upon the denial of due process of law by the State Courts.

The case below originated from a Long Island daily newspaper's expose of certain land transactions involving public officials in Suffolk County, New York. The matter attracted sufficient daily newspaper exploitation resulting in a transfer of the trial to neighboring Westchester County. The alleged criminal conduct occurred in 1962 but the criminal charges were returned by Indictment in 1967 just prior to the expiration of the statutory limitations period.

Donald J. Kuss was a Town Councilman of the Town of Islip. Mr. Fallon, a local attorney, spoke with him concerning the possible erection of apartments on a certain parcel of land in Islip. The existing zoning of the land permitted the erection of apartments but certain covenants and restrictions previously imposed by the Town of Islip prohibited such use. Accordingly, a modification of those covenants and restrictions by the Town Board was necessary to erect apartments but a change of zone was not requisite. Mr. Kuss advised Fallon that he did not believe that the Town Board would approve such a modification.

Thereafter Donald Kuss negotiated terms of sale of this particular plot and discussed a possible purchase of the land by the law partnership of Walter Conlon and Gilbert Roseman. Gilbert, inexperienced in building, brought in his brother, Howard, an attorney and builder, as a third member of the purchasing group.

Howard Roseman inspected the property together with Mr. Kuss and later with his architect. Roseman initially refused to buy the parcel because of the existing covenants

and restrictions but later decided to go ahead with the purchase. Donald Kuss requested, and the purchasers agreed, that Mr. Kuss would receive a fee of $10,000 for bringing the purchasers the deal. The fee was earned upon the execution of the contract of sale prior to any Town Board action on the covenants and restrictions. Both Roseman brothers testified that the fee due Donald Kuss was not dependent upon any future act of Mr. Kuss.

Shortly after the execution of the contract Mr. Kuss moved to modify the covenants and restrictions, which motion was unanimously passed. The description of the property that was submitted with the new covenants and restrictions was in error and permitted the erection of 100 units instead of the permissible 99 units. That erroneous metes and bounds description was prepared by Walter Conlon.

Donald Kuss entered into additional business transactions with the purchasers (including one hereafter referred to as the "Aeronautical deal") which resulted in additional fees due him. There was a total of five checks paid to Mr. Kuss by the purchasers. Some or all of these checks were for the Aeronautical deal. It is indeed critical to show the transaction upon which the $6,500.00 check was paid, for it could rule out prosecution because of the statute of limitations. Joseph Karasyk, an Internal Revenue Service agent, testified that Howard Roseman had told him, long before any criminal proceedings had been instituted, that the check here alleged to have been paid on the subject transaction was really paid on the Aeronautical deal.

The purchasers eventually sold the property at a substantial profit when they discovered that they were unable to arrange for adequate financing to build.

The Court of Appeals of the State of New York did consider the constitutional questions raised by the petitioners concerning the denial of a fair trial upon the grounds that

the indictment failed to state facts sufficient to constitute a crime and is jurisdictionally defective in that it fails to state specifically that the monies which were received or agreed to be received were unlawful. The Court also considered the denial to the petitioners of their Sixth Amendment rights to be confronted by witnesses by the failure of the prosecution to provide the transcripts of interviews tape recorded conducted between the witnesses and the District Attorney's office. The Court further questioned the petitioners' claim of the violation of their Fifth Amendment privilege against self-incrimination by the use of evidence unconstitutionally obtained from a prior Grand Jury hearing to effect the indictment in the cause herein. The Court of Appeals considered these conditions and found no violation of the petitioners' constitutional rights.

The Court of Appeals did not consider the petitioners' contention that the Trial Court's charge in effect required petitioners to prove their innocence and thereby violated their constitutional rights since no objection was raised at the trial (Appendix C).

POINT I

The State Courts deprived the petitioners of due process of law guaranteed by the Constitution in that the totality of the errors denied them a fair trial.

A.

It was unconstitutional for the New York Court of Appeals to refuse to consider a fundamental constitutional right due to the omission of an objection to the error at the trial level.

The trial Court's charge to the jury requiring defendant, Kuss, to prove his innocence was such an abuse of a fundamental constitutionally protected right that the failure to object at trial must be disregarded in order to

protect his fundamental right to a fair trial guaranteed by constitutional safeguards on both federal and state levels.

In marshalling the evidence the Court charged:

> "Now, with respect to the Aeronautical deal that you have heard testimony about here. There is no claim by the People that there was anything wrong with that transaction, nor is there anything wrong about it. That transaction came into this case because of the claim of the defendant Kuss that the $6,500.00 payment was not paid to him as claimed by the People on the DWH transaction but was paid and received by him as money owned him on the Aeronautical deal" (A2011).

That marshalling of evidence succinctly set forth the defense of Donald Kuss.

Clearly, if the jury had had a reasonable doubt as to whether or not the $6,500.00 was paid to Donald Kuss on the Aeronautical deal, then they were duty bound to acquit. It needs no citation to establish that if the jury has a reasonable doubt as to any element of the crime, it is their duty to acquit. This fundamental, axiomatic and touchstone rule of law was violated when the court charged the jury as to the very essence of the defense. The charge required the jury to find affirmatively that the $6,500.00 was paid on the Aeronautical deal in order to acquit rather than simply requiring that if the jury had a reasonable doubt that the $6,500.00 was paid on the Aeronautical deal they should have acquitted. The court charged:

> "I charge you as a matter of law, that if you so find that the $6,500.00 was for the Aeronautical deal, then you cannot convict the defendant Kuss nor the defendant Conlon, and in that case, you must acquit both defendants, and your verdict would be not guilty" (A2011-12).

There can be no more fundamental doctrine in criminal law than that the People have the entire burden of proof beyond a reasonable doubt and that the accused has none; and that the jury must find the facts beyond a reasonable doubt in favor of the People before there can be any conviction (*Code Crim. Proc. 389, cf. CPL 7020*).

It is true that no specific exception was taken to that portion of the court's charge on trial. However, it is submitted that no exception need be taken to preserve for appellate review a deprivation of a fundamental right of a defendant (*People* v. *Bradner,* 107 N.Y. 1; *Concemi* v. *People,* 18 N.Y. 128; *People* v. *Miles,* 289 N.Y. 360; *People* v. *McLucas,* 15 N.Y. 2d 167).

B.

The indictment fails to state facts sufficient to constitute a crime and is jurisdictionally defective.

The defendants were indicted and charged with having violated Section 1826 of the Penal Law of the State of New York (1909). Section 1826, at the time of the Indictment, stated:

> "A public officer . . . who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law, for doing or omitting to do any official act . . ."

The Indictment (A6) alleged that the defendant, Kuss, being a public officer, asked or agreed to receive a promise of $10,000.00, and on or between May 25, 1964 and June 5, 1964, did receive $6,500 for performing an official act, but nowhere does it state that the monies which were received or agreed to be received were unlawful.

The statute itself is entitled, "Taking Unlawful Fees". It would appear that it would require an element that the fees be unlawful in that it specifically states:

"Except such as may be authorized by law . . .".

The defendants both demurred to the Indictment, arguing, *inter alia,* that the indictments were insufficient as a matter of law.

The defendants contend that the words, "except such as may be authorized by law" create a true exception and not a proviso and as such must be pleaded and proved by the prosecution in the Indictment and at the trial, and that failure to allege such illegality in the Indictment or failure to prove the same at trial, make the Indictment jurisdictionally defective. Admittedly the distinction between a true exception and a proviso has caused much litigation and some judicial confusion.

In the words of Chief Judge Hiscock:

> "The two classes of provisions—exceptions and provisos—frequently come closely together and the rule of differentiation ought to be so applied as to comply with the requirements of common sense and reasonable pleading." *People* v. *DeVinny,* 227 N.Y. 397 at page 401.

The Chief Judge also stated the general rule:

> "That in dealing with the statutory crime, exceptions must be negatived by the prosecution and provisos utilized as a matter of defense."

In *People* v. *Kohut,* 30 N.Y. 2d 183, 187, the Court apparently reaffirmed the rule so that:

> "If the defining statute contains an exception, the indictment must allege that the crime is not within the exception, but when the exception is found outside the statute, the exception generally is a matter for the

> defendant to raise in defense, either under the general issue or by affirmative defense."

That the language is found in the statute is clear. Furthermore, without the language in the statute, the heading "Taking Unlawful Fees" would not make sense. Without that exception, any officer taking any fees would be violating the statute. Obviously that is not what the legislature intended, it is only the taking of an unlawful fee that the statute seeks to prohibit. The exception is part and parcel of the statute. It is an integral part of the statute. It exempts the acceptance of unlawful fees absolutely from the operation of the statute. It is in the title and in the enacting clause, and, quite obviously, is a true exception.

> "An indictment returned by a legally constituted and unbiased grand jury, . . . *if valid on its face,* is enough to call for a trial of the charge on the merits." (*See Matter of Miranda* vs. *Isseks,* 41 A.D, 2d 176, 178) Emphasis added.

Thus, where the prosecutor fails to allege the required statutory exception, as claimed at bar, the indictment becomes invalid and jurisdictionally defective (*Miranda, supra; cf. Costello* v. *U.S.,* 350 U.S. 359, 362).

C.

The defendants were effectively denied their rights of confrontation and cross-examination.

Federal standards as well as our state constitutional guarantees mandate the right of an accused to confront the witness as a fundamental right essential to a fair trial (*Pointer* v. *Texas,* 380 U.S. 400). The primary purpose of the confrontation clause of the Sixth Amendment is to secure the right of cross-examination and restrictions upon the right of cross-examination may violate defendants' rights (*Smith* v. *Illinois,* 390 U.S. 129).

Gilbert and Howard Roseman were Conlon's partners in this land deal and allegedly agreed to the payment to Kuss. Both had appeared at the District Attorney's office and had tape recorded interviews. Defense counsel demanded their production but was advised that they were not transcribed but he could listen to the tapes (A1729-1742).

The District Attorney knew of these interviews; he knew the law would require their production; he knew they would be extensively cross-examined; yet he chose not to transcribe the tape. This was not an isolated instance but rather was part of a course of conduct. During the trial the court was advised by the Prosecutor that the co-defendant Conlon's taped interviews had not yet been transcribed (A184). The stenographer, however, indicated that the tape was transcribed in December, 1967 (A265), and that an original and two copies were given to the Prosecutor's office (A268). Lieutenant Buckley also indicated that the Prosecutor had the transcript at an earlier date (A235). The tape was never made part of the record and there is no way to know whether or not the transcript was material or even perhaps exculpatory for this defendant.

The failure to provide the defense with transcribed copies of the Rosemans' tape recorded interview and the co-defendant's taped interview denied the defendants their right to confront and cross-examine witnesses and militated against any known concept of fair trial (*Alderman* v. *United States*, 394 U.S. 165; *People* v. *Miller*, 28 A.D. 2d 1205; *see also People* v. *Bach*, 33 A.D. 2d 560; *People* v. *Colombo*, 24 A.D. 2d 505; *Brady* v. *Maryland*, 373 U.S. 83; *Griffin* v. *U.S.*, 183 F. 2d 990, 992).

Additionally, demand was made for the 1965 Grand Jury testimony of Donald Kuss (A1703). That request was denied by the Court (A1703, 5). Clearly as a defendant is entitled to pre-trial copies of any statement made to law

enforcement personnel (*People* v. *Remaley*, 26 N.Y. 2d 427; *People* v. *Bach*, 33 A.D. 2d 560; CPL 240.20, subd. 1), he similarly is entitled upon demand to a copy of his own Grand Jury testimony (CPL 240.20, subd. 1).

In view of the handling of Conlon's tape interviews, defendants are minimally entitled to have the cause remitted to the lower court for a hearing to determine if the transcripts were made and denied to defendants and the appeal held in abeyance pending such determination.

D.

The receipt in evidence of the co-conspirator's statement subsequent to the termination of the joint enterprise without proper limiting instruction mandates a new trial.

The defendants were indicted and tried on the theory that they aided and abetted each other in the commission of the alleged crime. The thrust of the defense of Donald Kuss was that the $6,500. paid to him was paid not on the transaction claimed by the People but rather upon another transaction (Aeronautical), with which there was nothing wrong. Concededly, the joint enterprise terminated in 1964. Testimony concerning Kuss's defense was elicited whereby it was testified that the alleged co-conspirator Conlon after the termination of the conspiracy told Roseman that Kuss learned of the deal from Fallon and that Kuss entered it in his books under the Aeronautical transaction because he voted on DWH. The impact upon the jury of such testimony concerning the sole defense is immeasurable. That testimony was admitted over objection (A1757-1759). No limiting instructions were given by the court but merely the objection overruled. This tasty morsel and its impact were of course commented upon in summation by the Prosecutor. A further objection was made and for the first time the court mentions that there is a portion of that testimony it will strike out (later) and in-

struct the jury (later) to disregard a portion thereof (A1878). Here, of course, the Conlon statement subsequent to the termination of the joint enterprise is again repeated to the jury and the court again failed to limit the impact of it but merely stated that some time later it would instruct the jury on it. During the course of the charge, the court repeated the testimony in the marshalling of the evidence (A1987), thereby again bringing to the attention of the jury the dramatic testimony. Only after this testimony is before the jury three times does the court then advise that it is going to reverse itself and for the first time charges the jury that the testimony is not binding against Kuss (A1988).

Fundamentally, declarations made by one conspirator during the course of the joint enterprise are admissible as evidence against all co-conspirators if made in the furtherance of the enterprise and while it is pending.

> "Narration of past facts after the enterprise has come to an end by success or failure is not admissible in evidence against the others."

(*People* v. *Marshall,* 306 N.Y. 223, 226; *People* v. *Ryan,* 263 N.Y. 298, 305; *People* v. *Vaccaro,* 288 N.Y. 170, 172; *see also, People* v. *McQuade,* 110 N.Y. 284, 307; *People* v. *Kief,* 126 N.Y. 661, 662-663). That rule is firmly implanted in our law and its violation is deemed to be prejudicial per se and to mandate a new trial.

In a strikingly similar case, this Court has had occasion to pass upon the effet of such procedure. Testimony of one co-conspirator's statement made subsequent to the termination of the conspiracy was admitted over objection. At the close of all the evidence the court called to the attention of the jury the fact that that testimony, after repeating it, was not admissible against the co-conspirator and the jury individually polled as to whether or not they would disregard such testimony. In that case, despite the polling

of the jury (not here present) and despite the fact that the testimony there was used before the jury but twice (here three times), the Court reversed the conviction. The Court held that the jury should have been instructed contemporaneously with the receipt of the statement in evidence and that in the absence of such instructions at that critical time, prejudice resulted and further that the prejudice was aggravated later when the testimony was repeated by the court in its admonition to strike it from their minds, stating in essence:

> "In the circumstances disclosed by this record we conclude—paraphrasing the language of this Court—that the admonition to disregard evidence which has been stricken out was easy to give and hard to follow (*People* v. *Robinson*, 273 N.Y. 438, 445-446; *see also, People* v. *Posner*, 273 N.Y. 184, 190; *People* v. *Mleczko*, 298 N.Y. 153, 162; *People* v. *Tasiello*, 300 N.Y. 425, 430-431)." *People* v. *Marshall, supra*, at 228.

The compounding thrice of the error committed leads to the inescapable conclusion that the jury had no alternative but to consider the evidence despite any good intentions to the contrary. Additionally, testimony by Roseman as to what Kuss allegedly told Conlon who then allegedly told Roseman is the rankest form of hearsay, inadmissible under any known concept. The defendants' rights were not only severely prejudiced, they were vitiated. A new trial is mandated.

E.

The Court erred in denying the motion to dismiss the indictment without conducting a hearing.

There can be no doubt that any testimony compelled under the threat of loss of governmental position is illegally coerced and cannot be used against that witness in a subsequent criminal proceeding (*Garrity* v. *New Jersey*, 385 U.S. 493; *Gardner* v. *Broderick*, 392 U.S. 273; *People*

v. *Steuding*, 6 N.Y. 2d 214). It is equally patent that the burden of showing the voluntariness of any statement as well as the competent waiver of the right to remain silent is placed upon the prosecution (*Miranda* v. *Arizona*, 384 U.S. 436; *People* v. *Huntley*, 15 N.Y. 2d 72) and a hearing to determine such competent waiver is mandated.

It is equally settled that there exists a "fruit of the poisonous tree" doctrine with respect to admissions and confessions (*People* v. *Robinson*, 13 N.Y. 2d 296, 301; *Katz* v. *United States*, 389 U.S. 347; *see also in this connection*, *Silverman* v. *United States*, 365 U.S. 505; *People* v. *Rodrigues*, 11 N.Y. 2d 279), as well as the more traditional concepts of physical evidence. The defendant claimed that the 1967 Grand Jury evidence was permeated by the primary taint. At Bar the Court ruled that it was the defendants' burden to sustain that accusation. The rule, however, is to the contrary and the burden rests with the People to show by clear and convincing evidence that the primary illegality did not lead directly or indirectly to the discovery of the evidence but rather that the evidence was obtained by an untainted source sufficiently attenuated so as to dissipate the primary taint (*People* v. *Robinson*, 13 N.Y. 2d 296; *Gilbert* v. *California*, 388 U.S. 263.

F.

The defendants were denied a fair trial by the prosecutor's inflammatory summation.

A fair trial is the most fundamental requirement in any criminal prosecution (*People* v. *Becker*, 210 N.Y. 274, 311); and no matter how persuasive the evidence of guilt may appear to be, a judgment of conviction must be reversed if the trial was unfair (*People* v. *Mleczko*, 298 N.Y. 153, 163; *People* v. *Tasiello*, 300 N.Y. 425; *People* v. *Levan*, 295 N.Y. 26, 36; *People* v. *Steinhard*, 9 N.Y. 2d 267; *People* v. *Savides*, 1 N.Y. 2d 554, 558; *Berger* v. *United States*, 295 U.S. 78); for guilty or not the defendant is entitled to a fair trial (*People* v. *Bai*, 7 N.Y. 2d 152, 155).

During the course of a lengthy and dramatic summation, the record reveals the following remarks:

> "Now, this is the story of two men who assumed office in the Township of Islip in our fair County of Suffolk, and made that Town their own little oyster, their own little public domain, to be cut, divided and plundered" (A 1888).
>
> ". . . that they could do no wrong for they were the reigning monarchs of this little Duchy of Islip; King Kuss and Khublai Conlon" (A1888).
>
> "Well, that initial inquiry on February 19th led to the lightning descent of the vultures of Sayville" (A1851).

Replete in the summation are further prejudicial remarks. The summation speaks in terms of damning the public (A1864), if Kuss hadn't been bought, somebody would tumble (A1863), and throughout its entirety filled with invectives and prejudicial remarks.

The last thought left with the jury was:

> "Well, you have heard all the evidence. If you can condone these acts; if you can excuse them; if you assume the standards of 'grab what you can' then you can acquit these men. But I don't think those are the standards of people. I don't think that you believe that the morality of the market place can be brought into government. If we assume these standards, if we can condone these acts, then small wonder that our children are rebelling now against the existing establishment, and its morality. They're rebelling against you, them, me, an evil and venal public officer is a greater threat to the public than a nest of robbers. Robbers can be dealt with by the law, but who can deal with those men who make the law—make and twist them.

"There is only one way for evil to triumph, and that is for good men to do nothing. We in Suffolk County ask you to do something. Thank you." (A1889)

The last reference is alone sufficient for a new trial. There can be no doubt that the attempt to influence the action of a jury by what the jury may think would be public clamor in the event of an acquittal is prejudicial and reversible error per se (*People* v. *Esposito*, 224 N.Y. 370; *People* v. *Fielding*, 158 N.Y. 542).

The totality of the errors committed in the State Courts effectively and conclusively denied petitioners their fundamental rights to a fair trial.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix "A"

STATE OF NEW YORK

COURT OF APPEALS

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

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2. No. 373. 71

The People &c.,

Respondent,

vs.

Donald J. Kuss and Walter Maclyn Conlon,

Appellants.

WACHTLER, J.:

On March 20, 1962 at a meeting of the Islip Town Board the appellant, Donald Kuss, a councilman and member of the Town Board, introduced and voted in favor of a resolution which changed the covenants and restrictions on a three acre tract of land located at the intersection of Lakeland and Johnson Avenues in Sayville, New York.

Originally this parcel had been zoned "residential", but in 1958 on application of the owner the major portion of the property had been rezoned "Business 1". Although this general category allowed the construction of stores and apartment houses, the Town Board had imposed a restriction or covenant limiting the use of the property to a shopping center, which the owner intended to erect. The 1962 resolution changed this restriction and permitted the

construction of an apartment complex which immediately increased the value of the property.

The prime beneficiary of the board's action was DWH Corp. which at the time the resolution was passed had a contract to purchase the property. This corporation was wholly owned by the appellant, Walter Conlon and two brothers, Gilbert and Howard Roseman. Subsequently, in July 1962 and May 1964, two checks, one for $2,700. and another for $6.500. were issued by Howard Roseman Associates to Project Development Company, a corporation wholly owned by the appellant Donald Kuss.

In 1967 Kuss and Conlon were indicted for taking unlawful fees in violation of (former) Penal Law § 1826. The People's theory was that Kuss aided and abetted by Conlon, had sought and received nearly $10,000 from the members of DWH Corp. for introducing and voting in favor of the 1962 resolution.

The appellants did not testify at the trial. The evidence concerning the circumstances surrounding the resolution and fees paid to Kuss came primarily from three witnesses; the two Rosemans and James Fallon, a Sayville attorney who had inadvertently brought the property into the limelight in 1962.

Fallon testified that he met with Kuss on February 19, 1962 on behalf of a client who was interested in having the restrictions changed so that he could purchase the property and erect an apartment house. Kuss informed him that the Town Board would never permit the property to be used in that manner.[1]

The Roseman brothers testified that in the latter part of February 1962, Kuss contacted Conlon who informed them that the property was available as an apartment house

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[1] As the representative from the Sayville area, Kuss' approval was considered crucial, since as a matter of policy the other members of the Town Board generally deferred to the recommendation of the member in whose area the property was located.

site. The selling price was $43,000 and Kuss wanted a fee of $10,000 "for bringing us this transaction". After Conlon arranged for the Rosemans to examine the site and talk with Kuss personally, they agreed to acquire the property with Conlon under the name DWH Corp. When the Rosemans later learned from the owners, that contrary to Kuss' representations, the property was not suitable for apartment houses, because of the existing covenants and restrictions, Conlon reassured them that the Town Board would allow the change as a routine matter. According to the terms of their oral agreement, Kuss was not entitled to any payments of his fee until they had "turned it (the property) into cash" and as Gilbert Roseman testified at the trial "I couldn't imagine him (Kuss) trying to hurt us."

DWH signed the contract of sale and shortly afterward, the Town Board, considering an application prepared by Conlon, and acting on Kuss' recommendation, voted to change the covenants and restrictions. In July 1962 DWH sold the property to another corporation for $107,500.

From these circumstances, the jury could clearly find that Kuss had been paid the extraordinarily high fee[2] by DWH for his vote as a Town Board member on the resolution which more than doubled the value of the property. And since the proof showed that Conlon had communicated Kuss' transaction to the Rosemans, recommended its acceptance, reassured them that the change of covenants would be a routine matter, and encouraged payment of the requested fee, there was clearly sufficient evidence from which the jury could conclude that Conlon was acting throughout as an agent or intermediary for Kuss and was aiding or abetting him in the scheme for their mutual benefit. (*People* v *Morehouse*, 21 N Y 2d 66)

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[2] While the original fee to be paid was $10,000. Kuss was paid a total of $9,200.

Appendix "A".

At the conclusion of the lengthy trial, the jury found the defendants guilty and they were subsequently sentenced to serve a term of one year imprisonment in the Suffolk County Jail. They are presently released on bail pending appeal. The Appellate Division has unanimously affirmed the conviction of Kuss, and Conlon's conviction was affirmed with one Justice dissenting.

The dissenter was troubled by Conlon's claim that he had been denied a fair and impartial trial by virtue of improper cross examination of his character witnesses combined with certain prejudicial remarks made by the prosecutor on summation. We have concluded that these alleged errors do not require reversal of the conviction.

At the trial Conlon called 12 character witnesses to testify as to his good reputation for honesty and integrity. On cross examination, the District Attorney asked all but one of the witnesses if they had heard certain reports indicating that Conlon had committed two acts of misconduct while serving as Town Attorney for Islip Township during 1963 and 1964. Specifically he asked whether they had heard that Conlon had failed to disclose to the Town Board an interest he had (in a corporate name) in some land upon which the Board granted permission to erect an outdoor movie on the same day it denied another corporation permission to build such a theatre on another piece of property located in the township. In the second question the witnesses were asked whether they had heard that Conlon had an undisclosed interest in some property (once again owned under a corporate name) which the Town Board wished to acquire for a parking lot; that he represented the Town Board in that acquisition and continued to represent both sides until the Board learned of his interest in the site.

Both of these questions were allowed over objection, and the defendant Conlon claims this was error.

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Whether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. (*People* v. *Sharp,* 107 N.Y. 427) and although character is the issue (i.e. the unlikelihood of the defendant's committing the crime), reputation is the only proof which the law allows. (*People* v. *Van Gaasbeck,* 189 N.Y. 408) Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant's good character.

But the rule is slightly different when it comes to cross examination of the character witnesses. When their credibility is at issue, it is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him. (Richardson on Evidence, § 157, p 143) However as the defendant indicates, there are certain limitations. The inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions. (*Michelson* v. *United States,* 335 U.S. 469; *People* v. *Alamo,* 23 N Y 2d 630; see also annotation, Cross-Examination of Character Witness for Accused with Reference to Particular Acts or Crimes, 47 ALR 2d 1258)

The defendant's first contention is that the court abused its discretion by permitting the District Attorney to ask the questions without preliminarily determining the source of his information. (see *People* v. *Alamo,* supra) He suggests that if the inquiry had been made, the court would have discovered that the district attorney was relying on certain newspaper reports made in 1967 and not on rumors circulating by word of mouth in the community, during the period alleged in the indictment.

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Although it is not entirely clear from the record what the source of the prosecutor's information was, it is significant that he offered on several occasions to demonstate his good faith by revealing the basis of his questions. Since the defendant neglected to pursue this inquiry at the trial he should not be heard to complain on appeal or to ask this court to speculate as to the exact nature of the prosecutor's sources.

In any event the fact that the court permitted the prosecutor to question the character witnesses as to their awareness of certain newspaper reports reflecting on the defendant's honesty and integrity, would not, in itself, constitute error.

While persuasive arguments could be made as to the doubtful reliability of certain newspaper reports, these same considerations would apply with equal force to unstantiated rumors carried by the "grapevine", and in the past, the courts of this state have recognized no distinction between the report and the rumor. (*People* v. *Fay,* 270 App. Div.; aff'd 296 N.Y. 510; aff'd 332 US 261; *People* v. *Jeffrey,* 82 Hun 409) The relevant consideration after all is not the truth or falsity of the particular account, but rather "the qualifications of the witness to bespeak the community opinion". (*Michelson* v. *United States,* supra at 483) To this end the prosecutor may inquire of the witness to see if he has heard of a particular event which was likely to result in some comment in the community if not injury to the defendant's reputation. "This is permissible as bearing on the credibility of the witness, for if these rumors or reports had come to the witness' attention, the value of his testimony as to the defendant's good reputation may be seriously impaired". (Richardson, supra p 143)

The second contention in this regard is that the district attorney abused his right to cross examine by suggesting that the rumors had a solid basis in truth.

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The comments complained of occurred when the prosecutor was called upon to inform the court as to whether there were rumors supporting his questions. He insisted on using the word "report"; on one occasion stated that this was "more than rumor even"; and said that he would be acting in bad faith if he "used a rumor". It was on these occasions that he offered to disclose the source of his information.

During these exchanges, the court advised the jury that "these questions are put to the witness merely to test the accuracy of his knowledge of the reputation of Mr. Conlon. They are not offered here for the truth of these statements". This advisement was repeated twice during the course of the cross examinations.

There is no doubt that it would have been better practice to hold these discussions on the law out of the presence of the jury. Although defense counsel generally prompted these colloquies there was no request that they be held in the jury's absence. Under these circumstances, the court's instructions on the law, which were clearly proper, should be considered an adequate remedy. The only alternative would be to hold that comments of this nature are prejudicial *per se* requiring a mistrial or reversal of the conviction whenever they occur.

To adopt a rule of *per se* error in this anomalous and confusing area of the law would be ill advised. On this point we can hardly improve on the observations made by Mr. Justice Jackson in the leading case of *Michelson* v. *United States* (supra at p 485):

> "... limiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects ... A defendant in such a case is powerless to prevent his cause from being irretrievably obscured and confused; but, in cases such as the one before us, the law foreclosed this whole confounding line of inquiry, unless defendant thought the net advantage from opening it up would be with him."

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As to the improper remarks made during summation, there is no doubt that the prosecutor did on several occasions resort to name calling and made unwarranted attempts to appeal to the fears and excite the passions of the jury. As an experienced trial attorney he should have known that these efforts were improper and unnecessary.

A careful review of the record however reveals that for the most part, no objection was made and therefore the alleged errors were not preserved for our review. Where objection was properly made, the court's disposition was appropriate. Considering all of these circumstances we have found that these overzealous remarks of the prosecutor do not require reversal of the convictions.

One other point which was not discussed by the court below deserves brief comment.

Kuss claims that he was denied his right of confrontation during the cross examination of the Rosemans. The thrust of his argument is that the district attorney was obligated to transcribe pre-trial tape recorded statements made by the Rosemans to law enforcement personnel.

In *People* v. *Rosario,* 9 N Y 2d 286, 290, we decided as a matter of policy that a defendant was entitled to see or "be given the benefit of" the pre-trial statements of prosecution witnesses for the purpose of cross examination. In our view the trial court fully complied with the *Rosario* mandate when it allowed an adjournment for more than a day in order to permit defense counsel to hear these tape recorded statements in preparation for cross examination. There is nothing in *Rosario* which imposes on the prosecutor the additional obligation of converting his work material into a form which would be most convenient for defense counsel at the trial. Nor is there any contrary authority in other jurisdictions which have adopted policies similar to *Rosario* (see annotation, Right of Defendant in Criminal Case to Inspection of Statement of Prosecution's Witness for Purposes of Cross Examination and

Impeachment, 7 ALR 3d 181). Of course if these recordings had been previously transcribed and were available at the time of the trial we would agree that the defendant would have been entitled to use them on cross examination.

We have considered the numerous other issues raised by the appellants and have found them to be without merit. The order appealed from should be affirmed.

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Order affirmed. Opinion by Wachtler, J. All concur.

Appendix "B"

Opinion of Appellate Division (April 19, 1971).

THE PEOPLE OF THE STATE OF NEW YORK, respondent,

DONALD J. KUSS and WALTER MACLYN CONLON, appellants.

Decided April 19, 1971.

Before Latham, Acting P. J.; Shapiro, Brennan and Benjamin, JJ.

Kenneth K. Rohl (Daniel Kirchman of counsel) for appellant Conlon.

Bracken & Sutter (John Joseph Sutter of Counsel) for appellant Kuss.

George J. Aspland, District Attorney of Suffolk County (Maurice Nadjari and Carl Spitznagel, Jr., of counsel), for respondent.

Per Curiam—The defendants, Kuss and Conlon, have been convicted of taking unlawful fees, in violation of section 1826 of the former Penal Law, which prohibited the taking of fees by a public officer for doing an official act. Kuss was a councilman of the Town of Islip when he allegedly violated the statute. Conlon, an attorney, but not a public officer, allegedly aided and abetted Kuss. The act involved was Kuss's introduction of and vote for a resolution by the town board which removed certain covenants and restrictions on a 3.3 (approximate) acre parcel of realty in Sayville, Town of Islip. And the charge was that Kuss had been promised $10,000 and was actually paid for this official act by him.

Briefly, the facts are these:

In 1957 the subject parcel was in a Residence B zone. It was then owned by a group headed by one Zavatt.

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Wishing to develop a shopping center on the parcel, the Zavatt group obtained from the town board a change of zone to Business 1, subject to a number of restrictions, including requirements that the parcel be developed with a shopping center, that the northerly 75 feet remain residential, that a 15-foot strip become a park and that the construction of the shopping center be completed within a specified period. The Zavatt group thereafter abandoned its plan and decided to sell the parcel.

In February, 1962, one Fallon, a local attorney, became interested in buying the parcel for a client who wanted to build garden apartment houses on it. Such houses ordinarily were permitted in a Business 1 zone, but could not be built on this parcel because of the restrictions imposed on it in 1957 when the change of zone was granted. Fallon spoke to Kuss about the possibility of having the restrictions removed and was told that the town board would not agree. Fallon therefore dropped the matter.

Kuss then brought this deal to Conlon, who, in turn, brought it to his law partner Gilbert Roseman and the latter's brother Howard Roseman. He told Conlon (and Conlon repeated to the Rosemans) that the parcel could be bought for $43,000, plus a $10,000 payment to Kuss; that they would be able to build apartment houses on the parcel; that pending legislation before the town board would soon prohibit such houses in a Business 1 zone and would, moreover, substantially reduce the permitted number of apartments per acre where such houses were authorized; and that the subject parcel would be unique and therefore more valuable because it would not be subject to the forthcoming restrictions. When the Rosemans questioned the size of the $10,000 payment to Kuss, Conlon replied that Kuss (who was also a real estate broker) was doing more than a broker normally could do, as it was Kuss's deal and he had worked out excellent terms

with the sellers. Shortly thereafter, Howard Roseman learned of the restrictions on the property. When he asked Conlon about them, Conlon told him that they would have to be changed, but that this was a routine matter.

By contract dated March 10, 1962, the Rosemans and Conlon contracted to purchase the parcel for $43,000, "as is," in the name of D. W. H. Corporation, a corporation owned by the three of them. The purchase contract obligated the sellers to consent to annulment of the restrictions on the property, but it did not condition the purchase on the removal of the restrictions. The contract further stated that no broker had brought about the sale and made no mention of any finder's fee. The oral agreement between the parties (Kuss, Conlon and the Rosemans) did not specifically make Kuss's fee contingent on the removal of the restrictions, but it did provide that the fee was not payable until Conlon and the Rosemans had recouped their investment and that recoupment could not in fact occur until after the restrictions had been removed.

At some time between March 10, 1962 (when the purchase contract was executed) and March 20, 1962, Conlon drafted a proposed town board resolution, on application of the Zavatt group, for elimination of the existing restrictions on the parcel. On March 20, 1962, Kuss introduced such resolution before the town board; his resolution followed the form and property description of the draft previously prepared by Conlon. This resolution was unanimously adopted and the town board thereby annulled the existing restrictions and replaced them with new ones permitting the erection of apartment houses on the parcel. On that same day (March 20, 1962) the town board adopted another resolution, effective forty-two days later, which prohibited apartment houses in the Business 1 zone. In October, 1962, the town board adopted a resolution reducing the number of apartments per acre that could be built

in an apartment house zone; this resolution did not control the subject parcel, so that 100 apartments were permitted on it (and were later actually built) instead of only the sixty-four that would have been permitted were the October, 1962, resolution applicable.

As a result of these resolutions, the value of the subject parcel was substantially enhanced, since the parcel became the only vacant land in a Business 1 zone that could be developed with garden apartments and it could be developed with many more units per acre than parcels located in apartment house zones.

Thereafter, Conlon and the Rosemans decided not to develop the parcel themselves and on July 16, 1962, they sold it to a developer for $107,500—more than twice what it had cost them. They received about $19,000 at the closing and the next day (July 17, 1962) they gave Kuss a check for $2,700, which was about what they had left after Howard Roseman took out $6,000 and Conlon and Gilbert Roseman each took out $5,400. Two years later (May 25, 1964) they gave Kuss another check for $6,500, thus making the total payments to him $9,200. These payments were characterized by the Rosemans as a "finder's fee"—a term apparently suggested by their accountant when he was told what Kuss had done to earn this payment.

On these facts the jury convicted Kuss and Conlon of the crime of taking an unlawful fee for performing an official act—Kuss as the public officer, Conlon as his aider and abettor. We believe these judgments should be affirmed.

The defendants contend that the trial court erred when it submitted to the jury, as a fact issue, the question whether the Rosemans were accomplices. They say that this was error because on this record the Rosemans were in the same position as Conlon; that the three of them

(Conlon and the two Rosemans) were either all innocent or all guilty; that if they were all innocent the question of accomplices should not have been brought into the case; and that if they were all guilty the court should have charged that the Rosemans were accomplices as a matter of law. We find no merit in this contention. It is well settled that where a fact question arises as to whether a witness was an accomplice, and different inferences can be drawn, it is the jury, not the court, that must determine that issue (*People v. Clougher,* 246 N. Y. 106, 111; *People v. Swersky,* 216 N. Y. 471, 476-477; *People v. Katz,* 209 N. Y. 311, 332). Here there was such a fact issue, since the Rosemans testified that they had engaged in a lawful business venture, with no knowledge of any illegality; and if that testimony were believed the jury could have found them free of criminal intent and consequently not accomplices of the defendants.

In any event, we see no material prejudice to the defendants even if it was assumed, *arguendo,* that the trial court should have charged that the Rosemans were accomplices as a matter of law. If they were so considered, corroboration of their testimony would have been required. And in this record there is ample proof to satisfy that requirement.

Conlon further contends that the proof did not establish that he was an agent of Kuss and that he consequently could not be held as his aider or abettor. We disagree. One who acts as an agent or intermediary for a public officer in taking an unlawful fee may be convicted, with the public officer, of a violation of section 1826 of former Penal Law (*People v. Brody,* 298 N. Y. 352, 358). Here, there is adequate proof to support a finding that Conlon as Kuss's agent or intermediary, arranged for the Rosemans to join the scheme for purchase of the land, removal of the restrictions, sale of the land at a profit, and ulti-

mate payment of $9,200 to Kuss from the proceeds as his share. And such finding is, in our view, sufficient to support the conviction of Conlon as aider and abettor of Kuss (cf. *People v. Morehouse,* 21 N. Y. 2d 66; *People v. Renner,* 16 N. Y. 2d 645).

In this same connection, Conlon complains about alleged inadequacy of the charge to the jury as to agency. Apart from the fact that we consider the charge adequate in this regard, Conlon did not object to these instructions or request further instructions on this point, so he cannot now complain.

Both defendants argue that they were deprived of a fair trial by the prosecutor's inflammatory summation and his cross examination of Conlon's character witnesses as to rumors and reports of Conlon's involvement in other improper transactions. With respect to the summation, suffice it to say that we do not find it so improper, when read as a whole, as to warrant reversal, even though some isolated, overemotional remarks in it might have been better left unsaid. With respect to the cross examination of Conlon's character witnesses, we do not find it outside the permissible bounds delineated by *People v. Alamo* (23 N. Y. 2d 630) and *Michelson v. United States* (335 U. S. 469). And if it were, we nevertheless would not deem it such prejudicial error as to warrant reversal, in light of this long complicated trial and the strong proof of guilt.

We have examined the defendants' other contentions of error and find no merit in them.

The judgments should therefore be affirmed.

All concur.

Latham, Acting P. J. (dissenting in part)—In this case the People chose to charge appellant Conlon with a violation of section 1826 of the former Penal Law, which is a

vague, general "shotgun" statute. A conviction of "aiding and abetting" under such a statute must be closely scrutinized.

In addition to the facts noted in the majority opinion, it should be pointed out that, according to the Rosemans, the People's own witnesses, Conlon's understanding at the very outset, as communicated to these witnesses by Conlon, was that the payment to Kuss was a fee for bringing the deal and that at no time was there any discussion between Conlon and these witnesses that it was for Kuss' services with respect to the covenants and restrictions. It is claimed by Conlon, and I agree, that at no time was it directly elicited from the testimony of these witnesses that he was aware of the covenants and restrictions before Howard Roseman went to sign the contract with the Zavatt group. Nor was anything elicited from these witnesses which would directly discredit Conlon's claim that he became aware of the covenants and restrictions at about the same time as the Rosemans after they had jointly decided to go ahead with the transaction. Accordingly, it is my view that any conclusion to the contrary implicit in the majority's opinion is predicated on inferences from the surrounding circumstances adduced and not from any evidence directly probative thereof. I also note that Conlon and his business associates, the Rosemans, on whose testimony the People primarily rely, were joint investors who acquired the property with their own funds. They also initially intended to develop the property themselves and abandoned the project because they lacked the funds to finance it.

Predicated on the foregoing, on the facts stated by the majority, and on my own review of the record, I am of the opinion that the proof, in essence and realistically viewed, demonstrates that the People failed to establish beyond a reasonable doubt that Conlon in any real sense acted as agent or intermediary for Kuss. The proof

shows that Kuss brought a real estate deal to Conlon for a fee and Kuss insured his own interest by effecting the passage of the necessary resolutions by the town board. Accordingly, it is my view that Conlon was an investor-principal acting in his own pecuniary interest and I do not consider him to have been an aider and abettor of Kuss in "taking unlawful fees" (statute heading of sec. 1826) so as to bring him within the purview of the particular statute involved herein (see *People* v. *Brody*, 298 N.Y. 352).

Assuming, *arguendo*, that Conlon's guilt as an aider and abettor be considered to have been established, the judgment against him should in any event be reversed and a new trial ordered as to him. In my opinion, substantial prejudice was engendered by the prosecutor's cross examination of Conlon's character witnesses. This, together with the prosecutor's inflammatory summation, justifies conclusions that Conlon was not afforded the benefit of a completely impartial and objective evaluation by the jury of his guilt or innocence and that he was thereby deprived of his right to a fair trial.

Surrounding this case was an emotionally charged atmosphere of public criticism precipitated by newspaper publicity which resulted in a change of venue from Suffolk County to Westchester County. In an excess of zeal, the prosecutor brought this atmosphere into the trial in his summation. While this bordered on prejudicial error, I would be inclined to treat it as not substantial enough to warrant a new trial were it not for the additional factor of the prosecutor's prejudicial cross examination of Conlon's character witnesses, which, in my opinion, tips the scales in favor of a reversal and a new trial in so far as Conlon is concerned.

The nature of this case was such that Conlon's reputation for honesty and integrity was a significant factor which could have affected the jury's evaluation of his

version of the transaction involved. He chose to place his reputation in issue. In doing so he presented twelve character witnesses, among whom were Supreme Court justices, town councilmen and others engaged in public service in Suffolk County, each of whom primarily attested to his reputation for honesty and integrity. In his cross examination, the prosecutor repeatedly asked questions of the character witnesses with respect to improper collateral transactions in which Conlon was reputedly involved. The following questions asked of one character witness were substantially similar to if not identical with those asked of most of the others and are set forth verbatim to demonstrate the thrust of my dissent:

"Q. . . . did you ever hear that the defendant Conlon, while he was town attorney, was associated with a corporation by the name of WAW Corporation; and further that this corporation had purchased certain property and that they applied for a change of zone on this parcel of property.

"Q. (cont'g) . . . and had you heard that this organization, WAW, of which the defendant Walter Conlon was a partner and an owner, had purchased a piece of property in the Township of Islip; and further that this company and Walter Conlon had applied for permission from the town board to construct an outdoor movie on that parcel of property; and that this was done while Walter Conlon was town attorney; and further, that Walter Conlon had failed to disclose his interest in this parcel of property to the town board when it voted upon this change of zone; and further had you heard that on the same day that the defendant Conlon and his corporation WAW, had applied for a change of zone to allow a construction of an outdoor movie, another corporation by the name of Grace Operating, Inc., an organization by the name of Grace Operating, Inc., came into that town board on the same day that Conlon aksed for his change of zone, and Grace said, 'I

want an outdoor movie house on my parcel of property in Islip'; and had you heard that Grace had been turned down on its application.

"Q. (cont'g) . . . and had you heard that Grace was turned down for a zoning change for an outdoor theater on the very same day that Walter Conlon was granted permission to place an outdoor theater on this property of WAW, failing to have disclosed his interest to the town board? Have you ever heard that?"

Following an objection by counsel that the prosecutor was getting into a delicate area which could lead to a mistrial, which objection was overruled, the prosecutor continued:

"Q. Had you heard that he was a member of a corporation in the year 1964, while he was town attorney, known as IXB Corporation; and further that the IXB Corporation purchased a parcel of property next to Town Hall in Islip at the very same time that the Town of Islip itself was attempting to negotiate terms for the purchase of this property; and further have you heard that the defendant Conlon was directed by the town board—when the town board was unable to acquire the property, was directed by the town board, since he was the town attorney, to negotiate terms of purchase with this corporation known as IXB, since the town wanted to purchase the property in question."

When counsel objected and the trial court stated to the prosecutor that it presumes he is asking whether the witness had heard any rumor along this line, the prosecutor responded: "More than rumor even, Your Honor." He thereupon continued:

"Q. (cont'd) And have you heard that the town board directed Walter Conlon, the town attorney to negotiate terms of purchase for this parcel of property next to the Town Hall; and that Walter Conlon returned to the

town board and said 'IXB won't sell'; and have you heard that *as a matter of fact* what he was telling the town board was that he was negotiating with himself with one hat acting as town attorney, and with another hat acting as the owner of a property that the town wished to buy—the property that the town wanted to buy; and have you heard that after he told the town board that IXB would not sell the property, that he spoke to the then town supervisor, Mr. Harwood, who testified in this court, and Mr. Harwood said to the town attorney Conlon, the defendant in this case; 'Mr. Conlon, I have heard rumors that you are interested in this property and that you own it; is there any truth in it?' And that the defendant Conlon thereon said, 'I have nothing to do with the ownership of this property.' And further, have you heard that the town board authorized the town attorney Conlon to condemn the property in question because they wished to use it for town purposes; they authorized him to condemn it, and for the town, he Conlon, condemned it, and in that fashion acquired a tax benefit whereby the profit on the property was taxed only to the 25 percentile; and further, have you heard that after it was disclosed to the town board that the defendant Conlon was interested in this property he asked the town board then to remove him from these negotiations." (Emphasis supplied.)

All but one of the character witnesses denied hearing about these incidents and one witness stated that the newspapers were full of reports in 1967 but not in 1964 when the incidents allegedly occurred.

In my opinion, the effect of the lengthy detailed recitals of factual background contained in these questions was to convey to the jury the impression that the misdeeds referred to had been well documented, investigated and authenticated and were truth and fact. That the prosecutor vouchsafed their truth was reflected in his

reaction to the court's attempt to keep the cross examination of a rumor level by stating as above noted, that more than rumor was involved. At another point he responded to an objection by offering *in the jury's presence,* to show his good faith in propounding these questions. At still another point and again *in the jury's presence he stated,* "I am not referring to these incidents as rumors. I would be in bad faith if I used a rumor." (Emphasis supplied.) This implantation of the impression of truth and fact was accentuated when the prosecutor repeatedly posed the same question to most of the other witnesses in substantially the same form and length as those above. In my opinion, the prejudicial impact on the jury of these repeated factual recitations, vouched for by the prosecutor, could not be erased by the prosecutor characterizing them as rumors or reports, or by the court admonishing the jury to so consider them.

Since the appraisals of Conlon's reputation by the character witnesses are from their very nature predicated on hearsay, I consider the prosecutor's attempt to test or discredit the accuracy of these appraisals, by referring to other collateral acts in such manner as to attribute to them the statute of truth and fact, an infringement upon Conlon's right to due process and to a fair trial limited to the crime with which he was charged. In arriving at this conclusion I am mindful of the latitude permitted in cross examining a character witness on the theory that the defendant in using such witness throws open the entire subject of his good name (*People v. Alamo,* 23 N. Y. 2d 630; *Michelson v. United States,* 335 U.S. 469). However, I do not find in either of these two decisions a justifiable basis for departure from the established principles (1) that the purpose of the cross examination of a defendant's character witnesses with reference to particular acts of the defend-

ant is not to establish such acts as facts or to prove the truth of the rumors or charges inquired about, but merely to show the circulation of rumors of such acts and to test the credibility of the character witness by ascertaining his good faith, information and accuracy (47 ALR 2d 1274), and (2) that the cross examination as to specific instances of misconduct on the part of the defendant should not be extended to the details or particulars of such acts (47 ALR 2d 1281). Nor do I equate the cross examination at bar with those embodying the limited specifics in *Alamo* or *Michelson* (cited by the court in *Alamo* as the leading modern case on the subject). I do not consider the cross examination and the prosecutor's claims of good faith *in the presence of the jury* in keeping with the rationale of the foregoing principles or of the foregoing cases.

This rather difficult area of offering and testing character testimony has been the target of serious and responsible criticism (*Michelson* v. *United States, supra,* p. 473) and has been said to be "full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other" (*Michelson* v. *United States, supra,* p. 486). It has also been stated to call for moderation by "discretionary controls in the hands of a wise and strong trial court" (*ibid.,* p. 486). Here, the trial judge properly attempted to exercise these discretionary controls but, nevertheless, I believe the cross examination exceeded the bounds of fairness and propriety.

I do not agree that the relevant proof with respect to Conlon's guilt of aiding and abetting was so strong as to warrant concluding that even if the cross examination be deemed prejudicial error it is not sufficient to warrant reversal. Nor can I justify any such conclusion because of the length and complicated nature of the trial. In my

opinion to permit this cross examination, coupled with the summation as noted, to remain unchallenged as reversible error is to open the door to a gradual deterioration of the concept of fairness which our judicial system is designed to preserve.

Accordingly, I conclude that the judgment against Conlon should be reversed as against him dismissed, or, in any event, that a new trial be ordered with respect to him.

Appendix "C"

DECISION COURT OF APPEALS JUL 3 1973

THE PEOPLE &c.,

Respondent,

vs.

DONALD J. KUSS and WALTER MACLYN CONLON,

Appellants.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.; Appellants contended that: the totality of the circumstances were such as to deny appellants a fair trial; the indictment fails to state facts sufficient to constitute a crime and is jurisdictionally defective in that it fails to state specifically that the monies which were received or agreed to be received were unlawful; appellants were denied their Sixth Amendment right to confront the witness by the failure of the prosecution to provide transcripts of the taped recorded interviews conducted between the witnesses and the District Attorney's office; the appellants' Fifth Amendment privilege against self-incrimination was violated by the use of unconstitutionally obtained evidence from a prior Grand Jury hearing to effect the indictment in the present case. This court considered these contentions and found that there was no violation of appellants' constitutional rights.

Appendix "C".

The construction of this court's jurisdiction under the Constitution of the State of New York precludes the raising of issues to which no objection was made at trial unless they involve certain fundamental constitutional rights, accordingly, this court did not pass on appellants' contention that a part of the court's charge to the jury, in effect, required appellants to prove their innocence.

Appendix "D"

COURT OF APPEALS OF THE STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

DONALD J. KUSS and WALTER MACLYN CONLON,

Defendants-Appellants.

ORDER

Defendants-Appellants herein, having heretofore on January 29, 1969, been convicted of taking unlawful fees, and sentenced to a term of one year, and upon appeal to this Court the judgment of conviction and sentence having been affirmed on June 6, 1973, and Defendants-Appellants having applied for a stay of the judgment and warrant pending the making and determination of a petition for certiorari to the Supreme Court of the United States, it is, on motion of John Sutter, Esq. attorney for Defendants-Appellants, hereby

ORDERED that the judgment of conviction and sentence for each of the Defendants-Appellants herein be and they hereby are in all respects stayed for a period of Forty-five days from the date hereof—in order to enable Defendants-Appellants to apply to the Supreme Court of the United States, or to a Justice thereof, for a further stay or for such relief as may be required—or, if the Supreme Court denies

Defendants-Appellants' application for certiorari, until the date of such denial whichever sooner occurs,—and it is further

ORDERED that the original of this order be filed in the office of the Clerk of Westchester County, and copies served upon the District Attorney of Suffolk County and the Clerk of the Court of Appeals forthwith.

SOL WACHTLER
Associate Judge of the Court of Appeals
of the State of New York

Dated: Albany, New York, July 3, 1973.

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IN THE

Supreme Court of the United States

JANUARY TERM, 1974

No. 73-585

DONALD J. KUSS and WALTER MACLYN CONLON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

JANUARY TERM, 1974

No. 73-585

DONALD J. KUSS and WALTER MACLYN CONLON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Donald J. Kuss and Walter Maclyn Conlon pray that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on June 6, 1973.

Opinions Below

The opinion of the New York Court of Appeals affirming the petitioners' convictions are reported in 32 N.Y.2d 436, 299 N.E.2d 249. The opinion of the Appellate Division, Second Department is reported in 36 A.D.2d 306. The petitioners were convicted on January 29, 1969, after

a jury trial, of the crime of Taking Unlawful Fees (former N.Y. Penal Law Section 1826), and the Supreme Court (Fanelli, J.) imposed a jail sentence of one year for each petitioner.

Jurisdiction

The jurisdiction of this court is apparently sought pursuant to 28 U.S.C. Section 1257, Subd. 3, it being argued that petitioners' Fifth, Sixth, and Fourteenth Amendment rights to a fair trial were unlawfully interfered with because under the peculiar circumstances of this case certain trial errors were committed. Petitioner also argues that his Fifth Amendment right against self-incrimination was violated by the use of unconstitutionally obtained evidence from a prior Grand Jury hearing to effect the indictment in the present case.

Constitutional Provisions Involved
United States Constitution

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law of 1909 Involved

Section 1826. Taking unlawful fees.

A public officer or a deputy, clerk, assistant or other subordinate of a public officer, or any person appointed or employed by or in the office of a public officer, who shall, in any manner act for or in behalf of any such officer, who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law, for doing or omitting to perform, or for having performed or omitted to perform any act whatsoever directly or indirectly related to any matter in respect to which any duty or discretion is by or in pursuance of law imposed upon or vested in him, or may be exercised by him by virtue of his office, or appointment or employment or his actual relation to the matter, shall be guilty of a

felony, punishable by imprisonment for not more than ten years or by a fine of not more than four thousand dollars, or both.

Statement of the Case

This is a case of official corruption involving a public officer's illegal receipt of monies for performance of a lawful act. Donald J. Kuss, a town councilman, was aided in his nefarious enterprise by his co-petitioner herein, Walter Maclyn Conlon, an attorney, and two brothers, Gilbert and Howard Roseman, who may or may not have been willing accomplices. The complex scheme revolved around changing use restrictions on a piece of realty in Suffolk County, New York after the petitioners purchased it and then sold it at a huge profit, part of which windfall was used to pay off the councilman.

The record suggests that the indictment herein was the result of extended and painstaking investigation, as well as the prosecutorial decision to immunize against prosecution for the relevant acts the two brothers mentioned above. The testimony of those two individuals, amply corroborated by independent proof, formed the nucleus of the prosecution's case.

In early February, 1962, James V. Fallon, an attorney practicing law in Sayville, had a conversation with his client about building garden apartments on a piece of property in Sayville, New York. Fallon then learned that covenants and restrictions prevented the construction of apartment houses on that site (A569-73, A629*). Acting in accordance with the instructions of his client who had already discussed the price with the prospective sellers,

---

* References, unless otherwise noted, are to pages of Appendix to Appellants' Briefs and Additional Papers on Appeal to Court of Appeals.

Fallon, saw the petitioner Kuss on February 19th in Suffolk County, at which meeting Kuss stated that he did not think that the Town Board would act favorably upon an application to permit erection of garden apartments on the site in question. Kuss was asked to take the matter up with the Town Board (A573-7, A657-8).

To effect an amendment of covenants and restrictions in 1962, the support of the councilman from the district involved was critical (i.e., the petitioner, Kuss, in the case of Sayville), for his views were generally adopted in executive sessions of the Town Council which were held on the mornings upon which public Town Board meetings were scheduled for the same afternoons (A564-9, A804, A838-9, A870-3, A891, A957-8). Thus, while amendatory efforts could be commenced, *inter alia,* by writing to the Town Board or the Supervisor, it was often deemed advisable to start by seeking the sanction of the councilman for the relevant area (A564-9, A870-3, A1048-50).

Thereafter, Fallon received a telephone call from Kuss' secretary in Sayville who informed Fallon that the Town Board would not honor his request to modify or to amend the restrictions on the property (A578-80). Still later, Fallon's client indicated to him that he had considered buying the pertinent property even with the covenants and restrictions applying, but he had been unsuccessful in his efforts (A684).

The members of the Town Board who testified at the trial asserted that Kuss had not discussed the Fallon application with them (A805, A840, A963-4, A1029). After the property was "committed" so that Fallon's client could not obtain it, that attorney received a telephone call from Kuss' office to the effect that the Town Board might reconsider their position (A653-4).

Between 1958 and 1966, the petitioner Walter Maclyn Conlon and Gilbert Roseman were law partners (A1100-1).

During that time, according to Gilbert Roseman, the petitioner Kuss, a licensed real estate salesman, "was involved with us in real estate transactions" (A1189).

In the latter part of February, 1962, the petitioner Conlon and the witness Gilbert Roseman had a conversation in their Nassau County office respecting the same piece of property (A1101-2). Gilbert Roseman recounted from the witness stand what Conlon had told him at that time:

> "Walter told me that Donald Kuss had come to him with a real estate transaction where we could buy in Sayville an apartment house site for $43,000 and that Donald would be getting an additional $10,000 for bringing up this transaction. As I understood it, it was a site that was presently zoned Business where you were allowed to build apartment houses at that time in the Town of Islip.
>
> • • •
>
> ". . . And he further stated that the Town Board of the Town of Islip at a future date was going to change the law so you no longer could build apartment houses in a business zone but at that time it was allowable and that we should consider going into the transaction" (A1117).

The petitioner Conlon, at the pertinent time, also remarked that ". . . it was all worked out [and] that it was an all-cash deal" (A1118). The conversation culminated in a suggestion by the witness that he and Conlon seek the advice of the former's brother, the witness Howard Roseman, an experienced builder (A1120).

Within a day or two, the Roseman brothers and the petitioner Conlon met in Nassau County, at which time Conlon stated that Kuss had identified the piece of realty in question (A1122-3). The Roseman brothers, at the trial, described consistently Conlon's statements during

the pertinent colloquy (A1117-22; A1335-8). Howard Roseman's account was as follows:

> "Mr. Conlon told me that he was alerted to a piece of property . . . on Lakeland Avenue and Johnson, for the possible purchase of this property.
>
> • • •
>
> "That he had been alerted to this piece of property by Mr. Kuss who was his friend and a Councilman in the Town of Islip about the advisability of buying this piece of property for the use of an apartment house site and he tried to tell me the various aspects of the property and he wanted my advice as to first evaluating it and would I be interested in participating in the purchase with my brother and with him.
>
> • • •
>
> "He told me the property was zoned as a shopping center as its present zoning was a shopping center but under the existing laws and ordinance of the Town of Islip that an apartment house was a permitted use on property zoned business and that there were many features to this property that would be interesting to me as a—having a background in the real estate and building business, the two features being, one, that there was proposed legislation in the Town of Islip that was going to change this existing rule such as you could use the property as an apartment house in a business zone because there was going to be legislation changing that and there was going to be a separate classification for apartment houses, separate and apart. There was also proposed legislation changing the rule of density; under the existing rule in the Town of Islip at the time of my meeting, the ordinance permitted 32 apartment houses on an acre and the proposed legislation would change that so that there would only be 16 apartments to the acre.

"So therefore, if an apartment were built on that property, we would have the value of having a hundred apartments because of the 3.3 acres of the property and the 32 to an acre would permit 100 apartments, and that would be the last apartment house that would be permitted having that many apartments in that small an area, and that was one of the features that would make this property rather valuable and I should keep in mind in the evaluating and giving an evaluation as to the price that had to be paid for the apartment house.

• • •

"He told me the price was $43,000 and that there was to be a payment to Mr. Kuss of approximately $10,000." (A1336-7)

The petitioner Conlon also stated, according to Howard Roseman, that everything had been negotiated and worked out by Kuss (A1338). When Howard Roseman complained about the sum to be paid Kuss, Conlon explained that it was "'. . . because this was mare than just a brokerage, this was Mr. Kuss' transaction, he had brought him all the terms and conditions, he did more than what would be normally a prim [sic] function of a broker,' and that for my purposes in evaluating I should evaluate it on the basis of the purchase price being $53,000" (A1338-9).

Subsequently, Conlon assured the Roseman brothers that changing the covenants and restrictions was a routine matter (A1144, A1413).

The contract of sale (Exh. 14) was signed on or about March 10, 1962, in Nassau County, the buyer being D.W.H. Corporation which was "owned" by the two Rosemans and the petitioner Conlon (A1130, A1202, A1257-9, A1414). The purchase price was $43,000, and the contract obligated the sellers to execute in writing their consent to annul and to cancel existing covenants and restrictions

but the purchase was not conditioned upon the removal of the restrictions (A1200-1; A1348-9; Exh. 14). Moreover, the contract recited that no broker had brought about the sale, and it made no mention of any finder's fee (Exh. 14). Concerning the oral agreement (i.e., between the petitioners and the Roseman brothers) it was Howard Roseman's ". . . understanding with Mr. Kuss through Mr. Conlon that Mr. Kuss was not to be paid any money on this transaction until such time as we had received our money . . ." (A1357).

On March 20, 1962, the Town Board passed a resolution, effective May 1st, taking apartment houses out of the B-1 category and placing them in a CA classification, public notice of which pending change had been ordered by the Board to be given on February 27th (Exh. 3B; A490-503, A801, A869).

Also on March 20th, the Town Board unanimously granted, on the motion of the petitioner Kuss, an application of the sellers to annul and to repeal the existing covenants, and restrictions, replacing those limitations with a new set which permitted the erection of apartment houses —construction to commence within a year and to be completed within three years—and which also called for some property at the southeastern end of the plot to be dedicated to the Town of Islip "on demand" so that a traffic hazard could be eliminated (Exh. 3C; A504-7, A755-8, see A996). In October 1962, the Town Board passed a resolution concerning density which reduced the number of apartments that might be built on a given area, and, while 100 apartments ultimately were built on the pertinent site, only 64 could have been legally erected had the later legislation controlled (Exh. 4A; A507-11, A785-91).

The 1962 covenants and restrictions which were approved by the Town Board had been drawn up and filed by the attorney-petitioner Conlon in the name of the sellers, and the provisions of the 1957-58 covenants and restrictions

excluding the northerly 75 feet and the 15-foot-strip along the easterly side of the plot from the intended use were not carried over into the new document (Exh. 11; A1127-30, A1348). In connection with that subject, one Estelle Clark, secretary in the law firm of Conlon and Roseman at the pertinent time, testified that, prior to March 20, 1962, she had typed the resolution in the Town Clerk's file (Exh. 2F) at the behest of Conlon, excepting that portion indicating that the relevant motion had been made by Kuss and seconded by Councilman Giordano, and that, also at Conlon's direction, she had typed the 1962 "Declaration of Covenants and Restrictions" (A766-7; Exh. 11).

The petition for the 1962 change in covenants and restrictions was signed apparently in Nassau County at the closing of April 2, 1962 (a date advanced from the original one for the purpose of protecting the vested interests of the Rosemans and Conlon) by the sellers, but these proposed limitations, as already noted, were drawn and filed with the Town Board by Conlon, who thereafter also filed the "Declaration of Covenants and Restrictions" (A1139-40, A1148-51, A1203, A1208, A1346-8, A1354, A1530-4). The petitioner Conlon based his application to the Town Board, *inter alia,* on data furnished him by Howard Roseman, who did not see the final draft of the proposed modifications submitted to the Town Board (A1427, A1534). At the behest of the petitioner Kuss, 50′ of the parcel were dedicated to the Town in the application aforesaid (A1422). Howard Roseman gave the new covenants and restrictions to Conlon at the closing, and the latter returned them the next day having first had Supervisor Harwood sign them, after which they were filed with the Town of Islip and sent to a title company so that they would be recorded in the County Clerk's Office (A1369, A1464-6).

The members of the Town Board at the time relevant, excepting the petitioner Kuss, testified at the trial, in essence, that they had voted in favor of the 1962 sellers' application

because of the petitioner Kuss' recommendation, without which assurance the measure would most likely have been defeated, according to their surmise (A804-5, A838-40, A954-64, A1025).

The two Roseman brothers and Conlon (each having invested in this venture $13-to-$15,000, which had been borrowed from a bank)—received such favorable reaction from a "feeler" advertisement that they decided to sell the property (*ibid.*). Thus, on July 16, 1962, D.W.H. Corporation sold the property in question for about $107,500 to Jack Wallace who assigned his interest to a W.I.P. Realty Corporation (A1151, A1351-2; Exh. 27). Similarly, the Rosemans and Conlon assigned, individually and in writing, the mortgage to a bank, and, incidentally, their signatures on the assignment were identified by Estelle Clark (A1263-4, A1765-6; Exh. 15). Some $19,000 was actually received at the closing, and a $5,400 check was then paid by D.W.H. Corporation to Conlon whose endorsement was identified by the witness Clark (A1471, A1764-5; see A1537, Exhs. 28, 28A, 30 and 31).

Besides the D.W.H. Corporation—which was formally dissolved on June 3, 1964—the Roseman brothers and Conlon, together with one Jack Farber, "owned" Howard Roseman Associates, Inc., a nominee corporation used for the convenience of banks which charged higher interest rates on mortgages to corporations than individuals (A1281-2, A1287-8). Also at the time now relevant, the petitioner Kuss was doing business as the Project Development Company, and his was the only authorized signature on the Project Development card at the Franklin National Bank (A529-30, A536; Exhs. 7 and 9).

On July 17, 1962, a check (Exh. 17) drawn on the Howard Roseman Associates' account in the amount of $2,700 and payable to the Project Development Company was given by Howard Roseman to the petitioner Kuss at the Roseman-

Conlon law office in Nassau County, which check was given pursuant to the agreement to pay that defendant approximately $10,000 for his services (A1153, A1355-6). The check was not drawn on D.W.H. Corporation because it had insufficient funds, and, moreover, the money was paid at that time because Kuss was pleading that he needed funds, albeit the understanding was that he was not to receive payment until the others had received their money including payment of the mortgage taken back by D.W.H. Corporation on the sale of the subject parcel of property (A1355-6).

On May 25, 1964, a second payment for services rendered was made by Conlon to Kuss in the form of a $6,500 check (Exh. 18) drawn on the account of Howard Roseman Associates and made payable to Project Development Company, which instrument was thereafter deposited to the payee's account at the Franklin National Bank (A545-6, A1166-7, A1358-9, A1366; Exh. 8). Again, the check was drawn on the Howard Roseman Associates' account because D.W.H. could not cover that great an obligation (A1358-9). The two sums represented by the checks were shown on D.W.H.'s books as accruals or obligations owed to Project Development Company (A1309-10, A1360-5; Exh. 29). Similar entries appeared on the books of Howard Roseman Associates (A1234-5; A1309-10).

In late summer or late fall of 1965, the petitioner Kuss had a conversation with Howard Roseman about the former's prospective appearance before the grand jury (A1366-7). At that time, Kuss stated that he would tell the investigative body that he did not receive any money in the D.W.H. transaction and that he would assert that the money he did get was from a subsequent deal, the reason being that ". . . I voted on the resolution in 1962 on the covenants, I don't want it shown that I received any money in that transaction" (A1367).

POINT I

Petitioners received a fair trial guaranteed by the Constitution and any alleged errors are either harmless errors correctly decided by the state reviewing courts or harmless errors which did not affect the substantial rights of the petitioners and did not contribute to their convictions.

A.

The Trial Court's Charge to the Jury Did Not Require the Petitioners to Prove Their Innocense. The Alleged Error Did Not Affect Their Substantial Rights and Should Be Disregarded Because Petitioners Failed to Object to the Instructions.

Kuss' defense at trial merely consisted of an attempt to show through a defense witness and by cross-examination of prosecution witnesses that the monies in question had been received by him in connection with another transaction (A1707-15), an effort that at most raised an issue of credibility for jury resolution—a determination that may not be faulted on this record (*People* v. *Tendetnick*, 237 App.Div. 9, 11 [1st Dept., 1932]; *People* v. *Atlas*, 183 App.Div. 595, 600 [1st Dept., 1918], aff'd 230 N.Y. 639 [1921]). On that score, the Trial Court's instructions (A2011-2) to which exception was not taken, did not improperly place the onus of proof on Kuss, as he now asserts on the basis of an incomplete quotation of the pertinent portion of the charge.

The balance of the court's charge on this point is as follows:

> "But, on the other hand, if you find the payment of $6,500 was not given to Kuss on . . . (another deal—author) . . ., then you will consider whether or not the People have proved beyond a reasonable doubt the

charge in the indictment against these defendants." (A2012)

Additionally, the court specifically instructed the jury concerning reasonable doubt (A1904-5).

In short, since the petitioners failed to object to the court's instructions, the construction of the New York Court of Appeals' jurisdiction under the Constitution of the State of New York (Article 6, Section 3, subd. a; see also CPL 470.05) precludes the raising of this issue for the first time in the Court of Appeals, and by extension in this court.

The alleged error did not affect a substantial right of the petitioners and should be disregarded (see also Fed. Rules Cr. Proc., rules 51 and 52 [a]).

B.

The Indictment States Sufficient Facts to Constitute the Crime of Taking Unlawful Fees in Violation of Former Penal Law Section 1826 and the State Courts Found No Merit to Petitioners' Contention.

Petitioners patently strain to claim a jurisdictional defect in the indictment leading to reversible error by the Trial Court respecting burden of proof discussed in subdivision A. This argument has been apparently inspired by the Court of Appeals discussion about pleading statutory exceptions and provisos in the case of *People* v. *Kohut* (30 N.Y.2d 183 at 187). Seizing upon the fact that the petitioners had interposed unsuccessful demurrers to the indictment, which demurrers, insofar as now relevant, were couched in broad statutory terms (A8-35)—and completely overlooking the fact that this plaint was not voiced by them in the Appellate Division and rejected in the Court of Appeals—petitioners postulate that a clause in former Section 1826 of the Penal Law (i.e., ". . . except

such as may be authorized by law . . .") constitutes an "exception" which must be negatived in an indictment. They then aver that there was a failure to do so here, with the result that the trial judge put the burden on them to etstablish that the fee herein had been received for another deal. The argument is specious.

To begin with, the Court of Appeals has construed the relevant wording in the statute as incorporating by reference not only other statutes but any mechanism (e.g., ordinance or contract) legally sanctioning payment of the pertinent fee (*People* v. *Clark*, 242 N.Y. 313 [1913]). That court in discussing Penal Law Section 1826 stated:

> "In this case the words ("not authorized by law"—author) must receive a broader construction if the purpose of the statute is to be effectuated. It applies alike to all offices, regardless of whether their compensation is fixed by statute or ordinance or contract legally made. It does not attempt to fix what compensation or reward may be lawfully obtained; but it prohibits and makes criminal the asking or receiving of more than is lawful" (at p. 327).

With the sources of legal approbation being virtually limitless, logic dictates that, assuming we were dealing with an "exception", use of the statutory term—"Taking Unlawful Fees"—in the present accusatory instrument came as close as any draftsman could come to negativing that "exception". Moreover, the obvious legislative intendment to subsume all sources conferring legality on a given transaction mandates the conclusion that we are dealing with a so-called "proviso" which does not have to be negated in the indictment and which, when there is a claim thereunder, must be put in issue as a defense at the trial (see *People* v. *Kohut, supra;* 1 Bishop, Criminal Procedure [2d Ad. 1872], Sections 631 et seq.). And, of course, we have seen that the charge to the jury (subdivision A) put no burden of proof on Kuss.

C.

Petitioners Were Not Denied Their Right to Confrontation During the Cross-Examination of the Prosecutor's Witnesses Because the Prosecutor Gave the Petitioners' Pre-Trial Tape Recorded Statements of the Witnesses and the Case Was Adjourned in Order to Permit Defense Counsel to Hear the Tapes.

Counsel for Kuss stated that he had subpoenaed the District Attorney of Suffolk County, together with some records, for the next day with a view towards trying to establish that Howard Roseman had not disclosed until the 1967 grand jury probe that any payments had been made by him for the D.W.H. transaction (A1663-4). In the course of those remarks, the attorney in question voiced his belief that Howard Roseman had not made the disclosure before the 1965 grand jury (*ibid.*).

After pointing out that he had been provided by the prosecutor with the transcript of Gilbert Roseman's testimony before the 1965 grand jury (as well as that of Howard Roseman—A1700), the same defense lawyer said he wished to find out if tape recordings had been made of Howard Roseman's testimony in either 1965 or 1967 (A1664-6). At that point, the prosecutor remarked that counsel had asked him to produce any statement made by Howard Roseman in 1965, and the prosecutor went on to state, in substance, that he had gone through every item in the case without finding such a statement (A1667).

The Court asked the prosecutor about 1967, and the latter remarked that a tape recording of a 1967 statement of Howard Roseman was in existence (*ibid.*). Whereupon, the same defense attorney asked for the tape, after which the prosecutor stated there would be no problem and that counsel should have asked for it at the proper time

(A1668). Then, the Trial Court directed the opposing attorneys to "make arrangements" (*ibid.*).

Further discussion ensued, during which counsel for Kuss asked about tape recordings of statements made by Gilbert Roseman (*ibid.*). The prosecutor responded that there was a tape for a 1967 interview but nothing for the year 1965, in which earlier year the prosecutor was not on the staff of the Suffolk County District Attorney (A1668, A1671). At the prosecutor's suggestion, the Court agreed that the playing of the tapes could begin immediately (A1669).

The record does not indicate that the playing of the tapes commenced at that point. In any event, Conlon rested his case that afternoon, with the result that Kuss had no witnesses present in court (A1686, A1693). At that juncture (seemingly 3:45 p.m.), the prosecutor suggested that the rest of the day could be used for listening to the tapes (A1693-4). Thereafter, the Court adjourned the case until Thursday morning so that the entirety of the next day could also be used for that purpose, and the trial jurist indicated that, since he would not be present at the playing, notations should be made of anything to be called to his attention (A1694-5).

On Thursday, counsel for Kuss made successful applications to recall the Rosemans for further cross-examination (A1716, A1728: relevant testimony summarized in fact statement above). Gilbert Roseman then was examined by Kuss' counsel and a single statement was adduced which the former had made on November 19, 1967 to police officers from the District Attorney's Office which contradicted his trial testimony on a matter concerning Kuss, after which the prosecutor sought to rehabilitate the pertinent witness (A1716-28). Also of note in connection with the examination of that witness is the fact that colloquy occurring during it indicates that the parties dis-

cussed the contents of the tapes in chambers with the trial judge (A1720), and the fact that Conlon's counsel did not choose to examine the witness further on this occasion (A1723).

After Gilbert Roseman was excused from the witness stand after having been recalled as a witness, the attorney for Kuss mentioned that he had listened to the 1967 tapes on Tuesday afternoon and for six hours on Wednesday, after which the Court apparently asked him if he was directing himself "• • • to this particular tape because the District Attorney has given you all other documents that you have asked for that he has" (A1729-30). Whereupon, the same defense attorney began to voice a plaint, which he commenced by saying that the prosecution had been tardy in apprising him about the taped interview thereby preventing him from obtaining a transcript (A1730-1). For that reason and because he had let some of the discrepancies he heard in the tape go unnoted because he thought that he would hear the tape replayed, counsel allegedly was unable to develop the discrepancies aforesaid when re-examining Gilbert Roseman (*ibid.*).

Counsel then asserted that the lack of a transcript therefore prejudiced both defendants, and he went on to expostulate that little could be done at that stage and also to take exception to an alleged judicial ruling requiring him to rely on his own recollection in conducting the pertinent examination (A1732). Thereupon, the Court remarked that no such limitation had been imposed, and that, in chambers, objection had been sustained as to one projected defense question, after which the Court explained the basis for that ruling (A1732-4).

Next, the trial judge asked Kuss' counsel what he wanted done "right now", to which the response was that he did not know, followed by a comment about not having had the transcript (A1734). Whereupon, the Court pointed out that there had been ample opportunity to hear the tape;

that everything on it could not have been contradictory; and that counsel had been at liberty at any time to mark the tape or stop it for the purpose of copying down anything said thereon (A1735-6).

Next, the prosecutor pointed out that he had provided the defense with every document they had requested when asked for, and that there had been no demand made for the 1967 tape until the prosecution's case had been put in (A1736). The prosecutor and counsel for Kuss then engaged in some colloquy about the situation, with the latter acknowledging that the prosecution had been helpful by stipulating to several discrepancies (A1737-9). Then, the prosecutor commented that there were only two discrepancies on the tape, after which the other lawyer acknowledged that the prosecutor was right about the first one (A1739).

Subsequently, the Court asked if counsel for Kuss wanted more time, which question received an affirmative answer, after which the prosecutor stated for the record that he had no transcript of the pertinent tape (A1739-40). Next, the Court made a comment to the effect that counsel had had enough time to go over the tape, after which the attorney for the defendant Kuss indicated that there was one question and answer on the tape which he considered vital (A1740). Then, the Court commented about how lenient it had been and about the ability of the Appellate Division to obtain the tape if necessary to pass on his ruling, remarks which prompted the attorney for Kuss to remark about the scrupulous impartiality of the Trial Court (A1740-1).

After that exchange, the presiding jurist said he was unclear about whether additional time to hear the tapes was being requested by Kuss, after which the attorney for that defendant stated the following:

> "If your Honor will be good enough to just let me have the one question and answer that this witness would give and that we could have a reporter take

it out from this whole tape, that would satisfy me, because that was a question * * *" (A1741).

The Court granted that request, after which the pertinent question and answer concerning the defendant Kuss only were located on the tape and then that colloquy was stipulated into the record in the presence of the jury (A1741-4). Thereafter the lawyer for Kuss, in answer to a question by the Court, stated that "that" was what he had wanted (A1744).

Thereafter, Howard Roseman was called to the stand for further cross-examination but he was asked no question concerning his pertinent pretrial interview of November 1, 1967 (A1745-61).

At this time, the defendant Conlon, who voiced no plaint below about the lack of pertinent transcripts, does not specifically challenge the pertinent ruling of the trial justice.

Also, we note that Kuss resorts to innuendo while arguing that the lack of transcripts deprived him of his fundamental right to confront witnesses. The implication is that, on the *Huntley* hearing concerning a recorded statement made by Conlon to police officers from the Suffolk County District Attorney's Office which the prosecution did not use later at trial, the prosecutor indicated that the tape in question had not been transcribed while the fact was that it had been. A glance at the record, however, will readily destroy the relevant innuendo. From the outset, the prosecutor indicated that the tape had been transcribed and that he was having copies of it made (A185). Moreover a copy of the 110 page transcript was given to the defense (A283-6), which used it as a basis for examination of at least one witness (A287-99).

Still, it seems to us that the possibility that a witness' recorded, pre-trial statement may differ however slightly,

from his trial testimony does not necessitate the prosecution's transcribing the statement in advance of trial and the Court of Appeals so held in this case (see also *People* v. *Rosario*, 9 N.Y.2d 286; *People* v. *Malinsky*, 15 N.Y.2d 86; *Jencks* v. *United States*, 353 U.S. 657; 7 ALR3d 181).

There was no resultant prejudice to the defendants. For the defense was given an ample opportunity to listen to them and to take notes, after which the pertinent witnesses were recalled for further cross-examination. The fact that additional cross-examination was conducted without a transcript was fully explored in the State Courts and the Trial Court took remedial action by insuring that both inconsistencies in Gilbert Roseman's testimony were elicited before the jury. Indeed, counsel for Kuss expressly indicated his satisfaction with the action taken by the trial justice.

D.

Relevant Out-of-Court Declarations of a Co-Conspirator Are Admissible in the Discretion of the State Court Judge Where the Statements Conceal the Fact That a Crime Was Committed or Conceal the Identity of the Perpetrators Because This State Recognized Exception to the Hearsay Rule Does Not Violate the Confrontation Clause of the Sixth Amendment.

Petitioners do not allege that there was insufficient evidence of a conspiracy agreement, and the Court of Appeals held that there was clearly sufficient evidence from which the jury could find both petitioners guilty.

The trial testimony made out a showing of a conspiracy sufficient to warrant admission into evidence against both petitioners any acts or declarations by either of them made in furtherance of the common scheme during the lifetime of the plot. For it is not disputed that "any act or declaration by one co-conspirator, committed in furtherance

of the conspiracy and during its pendency, is admissible against each co-conspirator provided that a foundation for its admission is laid by independent proof of the conspiracy" (72 Harvard Law Review, Criminal Conspiracy, pp. 920 *et seq.*, at pp. 984-985; *People* v. *Jelke,* 1 N.Y.2d 321; *People* v. *LaBarbera,* 274 N.Y. 239; *People* v. *Ryan,* 263 N.Y. 298). That rule obtains even in the absence of a formal conspiracy charge in the indictment (*People* v. *Luciano,* 277 N.Y. 348, at 358 [1938], a type of charge that was time-barred in the instant case. Moreover, only a *prima facie* showing of conspiracy need be made at the trial in order to make acts and declarations of one conspirator admissible against all of them as proof of the illegal agreement (*People* v. *Connolly,* 253 N.Y. 330, 340 [1930]; *People* v. *Cassidy,* 213 N.Y. 388, 391 [1915]; *People* v. *Davis,* 56 N.Y. 95, 102-103 [1874]).

Thus, the trial judge properly admitted against Kuss a number of his (i.e. Kuss') statements which Conlon repeated to the Rosemans. In that instance, the lower court jurist admitted a post-conspiracy statement attributed by Conlon to Kuss (A1757-9). In *Dutton* v. *Evans,* 400 U.S. 74 [1970], this court upheld a Georgia statute which allowed declarations of one co-conspirator to be admitted as against the other; "so long as the conspiracy to conceal the fact that a crime had been committed or the identity of the perpetrators of the offense continued". (See also *California* v. *Green,* 399 U.S. 149 at 155-56, 22a CJS Criminal Law, Section 770). The co-conspirators exception has been restricted to a narrower scope in the federal courts (*Grunewald* v. *United States,* 353 U.S. 391; *Krulewitch* v. *United States,* 336 U.S. 440; *Fiswick* v. *United States,* 329 U.S. 211).

At a point in the prosecutor's summation (A1878) when reference was made to the relevant testimony, the Trial Court stated in the jury's presence that a proper admonition would be given to the jury. Thereafter, he made

good that promise by voicing a curative instruction, during which remarks he informed the jury of his error (A1988). That action, in our view, negated any likelihood of resultant prejudice to the petitioner Kuss. Additionally, the subject matter of the pertinent utterance was already in evidence by virtue of the testimony of the attorney Fallon, to wit, that Kuss had learned about the land opportunity from a local lawyer. In view of the aforesaid considerations, any error in this connection, may readily be deemed innocuous (Code of Criminal Procedure, Section 542, now CPL Section 470.05 [1]).

E.

The Indictment Found Against Petitioners Was Obtained From Sufficient Evidence Which Was Independent of Any Testimony, Links or Leads Furnished by the Petitioners When They Testified at a Previous Grand Jury Hearing, and Assuming *Arguendo* That the Indictment Was Not so Found, Petitioners Are Only Entitled to Testimonial Immunity.

The defendants herein were indicted by a Suffolk County grand jury in December, 1967, but neither testified before that body. Previously, both Conlon and Kuss had testified, after executing waivers of immunity, before a different grand jury which sat in that County in 1965-1966 (A51). At the time they did testify, petitioner Kuss was an Islip Town Councilman and petitioner Conlon apparently was the Islip Town Attorney. Among other pretrial motions herein, the petitioners made one to dismiss the indictment. The supporting papers indicated that the petitioner Kuss had been a public official at the time of his 1965 grand jury appearance; that he had testified because of fear of being removed from office, and that Kuss' statements before that body were used in the 1967 proceedings to obtain the indictment. Those papers did not voice any plaint about "leads."

In connection with his denial of the motion, Justice Stark, himself, inspected the minutes of both grand jury proceedings, and he concluded, *inter alia*, that Kuss' statements before the earlier grand jury were not presented or read to the second deliberative body, nor was the testimony of any other witness given during the earlier probe shown or read to the second grand jury (A51-2).

Later, Kuss moved to inspect the grand jury minutes and to dismiss the indictment on the grounds that he had been coerced into testifying before the earlier grand jury because of the New York State Constitution's sanction against a public official's refusal to execute a waiver of immunity, and that his statements aforesaid, or leads derived therefrom, had been used against him by the prosecution in obtaining the indictment (A71-81). No effort to demonstrate his thesis was contained in the supporting papers of the petitioner Kuss, a defect pointed up in the opposing papers of the prosecution wherein it was also asserted that the indictment was obtained "• • • from evidence which was obtained independent of any testimony, links or leads furnished by the petitioner before the September 1965 Grand Jury" (82-3). Justice Fanelli denied this motion in all respects, postulating an infringement of Kuss' rights under the Fifth Amendment and reasoning that such an abridgement would not result in transactional immunization barring his trial on the 1967 indictment (A84-6). Additionally, the jurist determined that there had been a fatal failure of proof on Kuss' part to demonstrate that his testimony during the earlier grand jury proceedings, or leads derived from it, had formed a basis for his subsequent indictment by a different grand jury (*ibid.*).

Thereafter, Kuss successfully obtained reargument of the motion described in the last paragraph, and he urged in his supporting papers that "leads" had been obtained

as a consequence of his testifying before the grand jury because he had told that group about his financial dealings with Howard Roseman who, at some undisclosed point, told investigators from the District Attorney's Office about those same transactions (A71-4). On this subject, Justice Fanelli ruled that he could not at that juncture determine the accuracy of the contention with any degree of certainty, and that its resolution must await the trial (A69-70, 87).

No claim is now made by the petitioner Kuss that he made objection to any item of evidence introduced at the trial in the way suggested by Justice Fanelli's admonition. Rather, the petitioner Kuss offers this Court an exposition of the governing law without relating it to this case and without attempting a factual showing of just what evidence or leads obtained as a consequence of his appearance before the earlier grand jury were utilized by the second grand jury in order to indict him. Also, the petitioner Kuss faults Justice Fanelli for deciding the initial motion without a hearing, and that petitioner makes no reference to that jurist's ruling upon reargument of the motion. None of the petitioner's plaints has merit, however.

To begin with, we concede that a violation of petitioners' Fifth Amendment rights before the grand jury would have prohibited the use of their testimony or leads derived therefrom as proof of their guilt at the trial [*Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Garrity* v. *New Jersey,* 385 U. S. 493 (1967)]. However, the existence of the relevant constitutional sanction did not, *ipso facto,* make the execution of a waiver of immunity by them unconstitutional [see *People* v. *Leo,* 23 N. Y. 2d 556, footnote 2, p. 561 (1969); *Passim People* v. *Goldman,* 21 N. Y. 2d 152, 156-159 (1967)]. Moreover, petitioners fly in the face of the authorities discussed herein when they urge that a coerced waiver of immunity would have cloaked them with transactional immunity [cf. CPL, § 190.40; see *Kastigar* v. *United States,* 406 U.S. 441 at 459-462 (1972).

Our remarks about a hearing prompt us to note the new Article 210 provisions of the CPL which now enable immunity claims to be tested by hearings precipitated by motions to dismiss the indictment. If in such a hearing the waiver of immunity were found to have been coerced, only testimonial immunity would attach, leaving open the "leads" question to be handled at trial. That is to say, the statutory scheme contemplates dismissal of an indictmen where transactional immunity barred the finding of an indictment; but, where testimonial immunity only is involved and the testimony itself was not used to obtain the indictment, the statute makes no provision for vitiating the indictment, much less for resolving the "leads" type of question now principally encountered in Fourth Amendment cases [see, *e.g., People* v. *Munger,* 24 N. Y. 2d 445 (1969)]. As the following discussion will show, the procedure employed at the trial stage by the court cannot be termed erroneous for Kuss was simply told to wait until trial to press his claim. Unfortunately for him, he delayed doing so until a point in the trial when granting of his request was no longer feasible. Accordingly, he should not be offered any further opportunity by this Court to pursue the relevant tack.

Again, we see no reason for ordering such a proceeding. An infringement of Kuss' pertinent rights would have entitled him not to transactional immunity but only testimonial immunity if he had in fact been a target of the invesigation, his status as a "target" being left open on this record [see *e.g., People* v. *Yonkers Contracting Co., Inc.,* 17 N. Y. 2d 322, 335 (1966); *People* v. *Laino,* 10 N. Y. 2d 161 (1961)]. Assuming, then, as Justice Fanelli did below for purposes of the motion, that there had been such a violation of right, the issue would be whether the pertinent contention about improper use of testimony or leads was properly handled at the trial court stage. As for that, the cases predating CPL, § 210.20 (d) and applicable here suggest that such a claim may be properly tested by mo-

tions to inspect the grand jury minutes and to dismiss the indictment [see, *e.g., People* v. *Laino, supra; People* v. *Steuding,* 6 N. Y. 2d 214, 217 (1959); *People* v. *Ryan,* 11 A D 2d 155 (3rd Dept. 1960); *People* v. *Gaparino,* 61 Misc. 2d 1076 (Westchester Co. Ct. 1970); *People* v. *Werkes,* 46 Misc. 2d 1020 (Queens Co. Ct. 1965); *People* v. *Seaman,* 174 Misc. 792 (Sup. Ct. Orange Cty., 1940); *People* v. *Macner,* 171 Misc. 720 (Sup. Ct., Oneida Cty., 1939); *People* v. *Steinhardt,* 47 Misc. 252 (Sup. Ct., N. Y. Cty., 1905)]. But, there is a flat statement in *Ryan* that the proper remedy is an in-trial motion to bar receipt of evidence.

Looking now at Kuss' effort to dismiss the indictment, it is clear that he cannot now establish impropriety. Justice Fanelli was acting upon precedent when he held that the failure of proof in connection with the first Kuss motion made inspection of the minutes unwarranted, for such was, at the pertinent time, the rule with respect to inspection—dimissal motions [*People* v. *Jackson,* 18 N. Y. 2d 516, 518-519 (1966); *People* v. *Howell,* 3 N. Y. 2d 672 (1958), see CPL, § 210.30], including one made in this particular context [*People* v. *Ryan, supra*]. *Jackson* and *Howell* make it clear that Justice Fanelli's order is not reviewable here [see *People* v. *Strauss,* 165 App. Div. 58 (2d Dept. 1914); *Matter of Montgomery,* 126 App. Div. 72 (1st Dept. 1908)]. But, in any event, this Court has the benefit of knowing from Justice Stark's earlier decision that no verbatim testimony from the earlier grand jury proceedings was utilized to secure the instant indictment. Beyond that, no statement made before the grand jury by Kuss, or Conlon for that matter, was introduced at the trial.

As for the second order and decision by Justice Fanelli, there is similarly nothing about it which should disturb this tribunal. For one thing, a perusal of the papers supporting the motion will make it clear that no basis was spelled out upon which that jurist could have made a determination, with the result that he left it incumbent upon the

defense to make appropriate objections about "leads" at trial. At this time, only the pretrial dispositions are attacked by Kuss, and he makes no claim that in-trial protests were made, so as to preserve the point for Appellate review [see *e.g., People* v. *Campbell,* 23 A. D. 2d 852 (2nd Dept. 1965); *People* v. *Kahigus,* 18 A. D. 2d 1064 (1st Dept. 1964)].

We note of course Kuss' references to cases arising under the Fourth Amendment where claims about the evidentiary "fruits" of an illegal seizure of evidence are tested at hearings. But in those Fourth Amendment cases appellate courts in New York will not take cognizance of a plaint unless it was properly raised below [*People* v. *Friola,* 11 N. Y. 2d 157 (1962), see Code Crim. Proc., §§ 813-c and 813-d; now CPL, Art. 710]. Interestingly, that same approach has been taken by the Court of Appeals in dealing with at least one type of Fifth Amendment claim—the Amendment herein involved [see *People* v. *McQueen,* 18 N. Y. 2d 337, 344 (1966)]. In that vein, this Court has ruled out the theory that a pretrial motion raising a Fifth Amendment claim automatically injects that issue into the trial [*People* v. *Cefaro,* 23 N. Y. 283, 285-289 (1968)]. Additionally, it may be observed that the privilege against self-incrimination is a personal right which may be waived by a defendant [*People* v. *Stueding, supra* at 222].

Here, Kuss' pretrial efforts failed to raise the pertinent question properly. Although explicitly instructed by the jurist in question to pursue his application at trial, that petitioner failed to take appropriate action, thereby waiving his relevant rights. Incidentally, the co-petitioner Conlon failed completely to raise this issue below, which bars him from asserting it now.

Before leaving this subject, we wish to offer a few comments of our own. Where there is uttered a claim that testimony coerced [*cf.* C.P.L. § 210.20(d)] from a de-

fendant before a grand jury was employed to indict him, a motion to inspect the grand jury minutes and to dismiss the indictment would appear to be a viable device for making that determination. While courts have been disposed on occasion to permit the defendant to make his own inspection of at least some portion of the grand jury minutes with a view to thereafter moving to dismiss the indictment [see, *e.g.*, *People* v. *Seaman*, *supra*; *People* v. *Macner*, *supra*; *People* v. *Steinhardt*, *supra*; *compare*, *passim*, *Proskin* v. *County Court of Albany Co.*, 30 N.Y. 2d 15 (1972)], a claim that verbatim testimony from a previous grand jury proceeding was used as evidence to obtain an indictment before a second grand jury is readily assessed by judicial inspection. Indeed, Justice Stark carried out the relevant type of inspection herein. In view of that action, Justice Fanelli certainly was not required to duplicate his brother jurist's efforts.

Yet, fully anticipating the testimony adverted to in the motion for reargument and having, as we shall see, read the 1965 grand jury testimony of the Rosemans, the defense made no relevant objection at trial to the receipt of prosecution evidence. Nor did it request a copy of either defendant's grand jury testimony in a timely fashion. In that event, the Trial Court might have been disposed to grant the request in order that the defendant might thereafter press a Fifth Amendment claim.

However, it was not until after the prosecution's case was in, as well as a good portion of Conlon's case, that Kuss unsuccessfully made a request for a copy of his grand jury testimony (A1695-1705). The basis of that request was that Kuss wished then to pursue his "leads" theory for the first time at the trial (*ibid.*). In the course of further colloquy, the prosecutor characterized Kuss' testimony before the first grand jury in 1965 as a "masterpiece of evasion," and he added that there was nothing in those statements which could have been of value to the

prosecution. The prosecutor went on to say that the defense had been shown the transcripts of the testimony of both Rosemans before the 1965 grand jury, with the result that the defendants should have been aware of at least one independent source of the evidence against them; namely, the 1965 testimony of Gilbert Roseman (*ibid.*).

In our opinion, the denial of the pertinent request was proper. For one thing, the remarks of the prosecutor constituted the functional equivalent of a representation that the 1965 testimony of Kuss was not used by the authorities to develop "leads." Secondly, the request was too dilatory to be honored. That is to say, the prosecution's case was in, and as a practical matter the Court could not then effectively make revaluations respecting the admissibility of the evidence aforesaid. Accordingly, we submit, that the incident being described does not militate against our thesis—that the petitioners waived their pertinent rights.

F.

The Remarks of the Prosecutor in Summation Were Not Prejudicial and Where an Objection Was Properly Made, the Corrective Action of the Court Rendered Such Statements Harmless. No Objection to the Remaining Remarks During Summation Were Made and, Therefore, the Alleged Errors Were Not Preserved for Review.

When perused, the prosecutor's summation (A1838-89) at the end of this lengthy and complicated trial will, we submit, be found free of anything resembling prejudicial error. Possibly some of the remarks therein might better have been left unsaid. But, any improprieties in the summation may readily be treated as harmless (see *People* v. *Kingston*, 8 N.Y.2d 384, 387 [1960]), and we submit that the sum of innocuous improprieties is never prejudicial error.

The prosecutor was of course entitled to draw fair inferences from the evidence (*People* v. *Doody*, 172 N.Y. 165, 174-175 [1902]). While summing up, the accuracy of the prosecutor's recitation of the facts was sometimes challenged, and, where necessary, the Court took ameliorative action by instructing the jury that it was their recollection of the facts that controlled (see e.g., A1854-5). Other matters now urged upon this tribunal were not objected to in the State Courts, rendering them non-cognizable on appeal (Code Crim. Proc., Section 420-a, now C.P.L. Section 470.05 [2]; *People* v. *Pindar*, 210 N.Y. 191, reargument denied, 210 N.Y. 621 [1914]; *People* v. *Hartigan*, 210 N.Y. 144 [1913]). Lastly, a few defense objections were sustained, after which the trial judge directed the jury to disregard them. And, of course, it must be presumed that the jury followed these directions (*People* v. *Gowasky*, 244 N.Y. 451, 464 [1927]; *People* v. *Dixon*, 231 N.Y. 111, 120-1 [1921]; *People* v. *Gibson*, 218 N.Y. 70, 73 [1916]; *People* v. *Barnes*, 202 N.Y. 77, 88 [1911]).

We begin our particularized analysis of the prosecutor's summation by referring to the portion most stressed by the defendants. At the end of the summation, the prosecutor remarked that the defendants had made the Town of Islip ". . . their own little oyster, their own little public domain, to be cut, divided and plundered" (A1888). Objection to these remarks was sustained, after which the jury were instructed by the Court to disregard them (*ibid.*).

Next the prosecutor said that the petitioners "• • • could do no wrong for they were the reigning monarchs of this little Duchy of Islip; King Kuss and Khublai Conlon" (*ibid.*). Again, an objection was sustained, and, at the request of defense counsel, the presiding jurist directed the jury to disregard the relevant remarks (*ibid.*). Then the prosecutor closed his summation with the comments

quoted in petitioners' petition to which objection was not taken.

Any plaint about the remaining remarks is not cognizable now because of the lack of objection. Still, it might not be remiss for us to comment on the petitioners' contention to wit, that the remarks in question suggested that a public clamor would result if there were acquittals.

Considering the utterances as part of a long summation detailing the evidence of the defendants' guilt, they cannot rationally be interpreted as a plea to convict merely to assuage the general public and without regard to the evidence. Indeed, a much more ready implication from the quoted remarks is a plea for the jurors to abide by their oaths and convict the defendants if the proof warranted no matter how unpleasant they found such action. Moreover, it is a fair reading of the statements under scrutiny that they were prompted by a concern that the jury might acquit not because of a failure of proof, but rather because they might view the transgression herein as something that should not be punished criminally given the oft-condoned practice of bestowing gratuities in the business world. In any event, the interpretation of the prosecutor's comments advanced by the defendants, if tenable at all, is too oblique and subtle to say that the jury could have been prejudiced thereby. Accordingly, any error in this context may, beyond a doubt, be treated as harmless.

In sum, any alleged error in connection with the summation was (1) corrected by the Court; (2) not objected to and, therefore, not preserved for review or (3) should be deemed innocuous (*Chapman* v. *California*, 386 U.S. 18, 24 [1967])—the views upon which the State Courts unanimously agreed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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